

Document #4941

8/13/87

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ADOPTED 8/13/87

THIRD SUPPLEMENTAL AGREEMENT AND AMENDMENT

This Agreement is made as of _____, 1987, among the CITY OF BOSTON, a municipal corporation ("City"), acting by and through its Mayor and Real Property Board, the BOSTON REDEVELOPMENT AUTHORITY, a public body politic and corporate ("BRA") organized under the laws of the Commonwealth of Massachusetts, and LAFAYETTE PLACE ASSOCIATES, a Massachusetts limited partnership ("Developer"), of which the present general partner is Mondev, Mass., Inc., a Massachusetts corporation.

WITNESSETH:

WHEREAS, the parties hereto have entered into an agreement dated as of December 22, 1978, supplemented and amended by agreements dated as of June 1, 1979, October 12, 1979 and February 26, 1982 and relating to a private and public development ("Lafayette Place") along Washington Street in Boston, Massachusetts. Such agreement as supplemented and amended is herein referred to as the "Tripartite Agreement".

WHEREAS, in implementation of Phase 2 of Lafayette Place the parties desire hereby to set forth a further supplemental agreement concerning and amendment to the Tripartite Agreement.

NOW, THEREFORE, in consideration of the mutual agreements herein contained and intending hereby to be legally bound, the parties hereto agree as follows:

Section 6.02 of the Tripartite Agreement is amended by deleting the proviso in the fourth full paragraph thereof (beginning with the words "provided that the Developer shall lose" and ending with the words "is or may become obligated hereunder") and substituting in its place the following: "provided that, unless the City and the Developer shall agree to a further extension, the Developer shall lose its rights hereunder to proceed with an acquisition if a closing has not occurred by January 1, 1989, unless the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing.

APPROVED AS TO FORM:

CITY OF BOSTON

Raymond L. Flynn, Mayor

APPROVED AS TO FORM:

CITY OF BOSTON

By: Real Property Board

General Counsel

Edward F. Roche,
Commissioner Real Property
Board Chairman of Real
Property Board

WITNESS:

BOSTON REDEVELOPMENT
AUTHORITY

Stephen F. Coyle, Director

WITNESS:

LAFAYETTE PLACE ASSOCIATES
By: Mondev Mass., Inc.,
general partner

Marco Tonci Ottieri

EXHIBIT A
SECTION 6.02 OF THE
TRIPARTITE AGREEMENT AMONG THE CITY OF BOSTON,
THE BOSTON REDEVELOPMENT AUTHORITY, AND
LAFAYETTE PLACE ASSOCIATES

Section 6.02. Right to Acquire Parcels D-1, D-2, D-3 and D-4. In the event that the City shall determine to discontinue the Hayward Place Garage, the Developer and its successors and affiliates (as defined in Section 9.03.j) hereof) are hereby given the sole and exclusive right and option on the terms herein set forth to acquire the unencumbered title to the interest of the City (except that such title shall revert to the City one hundred (100) years and one (1) day from the date of recording of the deed thereof) in Parcels D-1, D-2, D-3 and D-4 or, if a subsurface parking facility shall be constructed thereunder, in the air rights over Parcels D-1, D-2, D-3, D-4 and New Essex Street (but only between Harrison Avenue Extension and Washington Street as shown on Exhibit A) and such rights appurtenant thereto as are necessary to make the air rights commercially viable. No sale, transfer or other disposition of any such rights shall be made by the City until three (3) years from the date on which the City has finally determined in accordance with law that the Hayward Place Garage is to be discontinued in operation and has given notice to the Developer of such determination and of the extent, if any, to which the City has determined and agrees to create subsurface parking beyond that to which it is obligated hereunder. If within

such period (the "Option Period") the Developer shall notify the City that it desires to purchase the rights hereby made available to it then the City shall sell the same (without air rights over New Essex Street, if the Developer shall so elect) to the Developer, its successors or its affiliates.

The City has obtained appraisals which it has determined are acceptable to it and which set forth the current fair market values of Parcels D-1 and D-2 and shall forthwith after the date of this Agreement obtain likewise acceptable appraisals for the current fair market values of Parcels D-3, D-4 and relevant interests in New Essex Street. Forthwith after the same are available, the City shall give copies of such appraisals to the Developer. The purchase price to be paid hereunder shall, if subsurface rights are not retained by the City, be the fair market values shown by such appraisals plus one-half ($1/2$) of the increase, if any, in such values as the result of construction of the Public Improvements and the Project. The purchase price to be paid hereunder shall, if subsurface rights are retained by the City, be one-half ($1/2$) of the fair market values shown by such appraisals plus one-half ($1/2$) of the increase, if any, in such values as the result of construction of the Public Improvements and the Project. The existence and amount of increase in fair market values attributable to the construction of the Public Improvements and the Project shall be determined by independent appraisal.

As aforesaid, the Developer may exercise the right and option set forth in this Section 6.02 by giving notice of its desire to purchase such rights to the City at any time within the Option Period. After the receipt of and following such notice from the Developer, the parties shall in good faith negotiate and enter into an agreement calling for the purchase and sale of the rights in question. Such agreement shall be in the customary form of agreements for the purchase and sale of real estate in the greater Boston area except that the agreement shall reflect such reservation and shall contain other appropriate provisions with respect to the integration of construction and other matters relevant to coordinated use of the rights conveyed and the rights retained by the City. Any such purchase and sale agreement may provide for a closing date extending up to six (6) months after the end of the Option Period and the expiration of the Option Period in any event shall not affect the rights of the Developer to proceed with an acquisition if notice of the exercise of such rights has been given prior to the expiration thereof, provided that, the Developer shall lose its rights hereunder to proceed with an acquisition if, because of a failure of the Developer to work in good faith to conclude a purchase and sale agreement or to perform thereunder, a closing has not occurred within six (6) months after the end of the Option Period, unless the City and the Developer shall agree to a further extension. Notwithstanding the foregoing, in all cases the Developer's rights hereunder shall extend for such period of

time as may be necessary for the City to substantially complete construction of any subsurface parking facilities for which the City is or may become obligated hereunder.

Prior to the construction of any additional subsurface parking facilities on Parcels D-1, D-2, D-3 or D-4 and prior to disposition of such rights to the Developer, its successors or affiliates, the City may use the surface of the land for parking so long as the same is operated and maintained to the highest standards and in keeping with the character of the Project. A conveyance under this Section 6.02 to the City which results in a reduction in the number of parking spaces in the Project Area shall not render the City in default under this Agreement.

On December 11, 1973 the City of Boston, the Boston Redevelopment Authority, and Lafayette Place Associates entered into a Tripartite Agreement which established terms and conditions regarding the development of Lafayette Place and the future disposition of adjacent public parcels. In Section 5.03 of the Tripartite Agreement the Developer was given the sole and exclusive right and option to purchase parcels D-1, D-2, D-3, D-4 or, if the City were to construct a subsurface parking facility thereunder, in the Air rights to these parcels. The option was contingent upon the City determining to discontinue the Hayward Place garage.

Although the developer exercised the option, the original Tripartite Agreement created ambiguity because it did not give a failure of the developer to work in good faith to conclude a purchase and sale agreement. The lack of clarity in the provision is exacerbated further because the agreement provided that the developer's rights shall extend for as long as it takes for the City to construct a subsurface garage on the site.

M E M O R A N D U M

August 13, 1987

TO: BOSTON REDEVELOPMENT AUTHORITY AND
STEPHEN COYLE, DIRECTOR

FROM: WILLIAM WHITNEY, ACTING DIRECTOR FOR URBAN DESIGN AND
DEVELOPMENT
PAMELA WESSLING, DEPUTY ASSISTANT DIRECTOR FOR
URBAN DESIGN AND DEVELOPMENT

SUBJECT: PROPOSED THIRD SUPPLEMENT AGREEMENT TO THE TRIPARTITE
AGREEMENT AMONG THE CITY OF BOSTON, THE BOSTON
REDEVELOPMENT AUTHORITY, AND LAFAYETTE PLACE ASSOCIATES

SUMMARY: It is proposed that the Authority enter into a Third Supplemental Agreement to the Tripartite Agreement among the City of Boston, the Boston Redevelopment Authority, and Lafayette Place Associates. The Tripartite Agreement, dated December 22, 1978, established terms and conditions regarding the development of Lafayette Place and the future disposition of adjacent public parcels. The Tripartite Agreement established an option period for the disposition of adjacent parcels with provisions for extensions which could extend the developer's rights for an indefinite period of time. The proposed Third Supplemental Agreement to the Tripartite Agreement would establish a drop dead date for the closing to be accomplished.

On December 22, 1978 the City of Boston, the Boston Redevelopment Authority, and Lafayette Place Associates entered into a Tripartite Agreement which agreement established terms and conditions regarding the development of Lafayette Place and the future disposition of adjacent public parcels. In Section 6.02 of the Tripartite Agreement the developer was given the sole and exclusive right and option to purchase Parcels D-1, D-2, D-3, D-4 or, if the City were to construct a subsurface parking facility thereunder, in the air rights to those parcels. The option was contingent upon the City determining to discontinue the Hayward Place garage.

Although the developer exercised the option, the original Tripartite Agreement creates ambiguity because we must prove a failure of the developer to work in good faith to conclude a purchase and sale agreement. The lack of closure to the process is exacerbated further because the Agreement provides that the developer's rights shall extend for as long as it takes for the City to construct a subsurface garage on the site.

To eliminate any ambiguity and to put closure on the period of time which the developer has to reach a closing, a Third Supplemental Agreement to the Tripartite Agreement is proposed. The proposed supplemental agreement would delete a proviso in the third paragraph of Section 6.02 of the Tripartite Agreement (which paragraph is attached hereto as Exhibit A), beginning with the words "provided that the Developer shall lose" and ending with "for which the City is or may become obligated hereunder", and substituting in its place the following:

provided that, unless the City and the Developer shall agree to a further extension, the Developer shall lose its rights hereunder to proceed with an acquisition if a closing has not occurred by January 1, 1989, unless the City and/or the Authority shall fail to work in good faith with the Developer through the design review process to conclude a closing.

The Third Supplemental Agreement thus would afford the developer reasonable time to prepare a proposal for review by the Authority and to complete the final drawings prior to the closing. Because it sets a specific date for the end of the option period, the Third Supplemental Agreement would provide closure to the obligations of the City and the Authority. If Lafayette Place Associates were unable to perform satisfactorily within the option period, the City would then be free to dispose of the parcel to another development entity.

It is, therefore, recommended that the Authority authorize the Director to enter into a Third Supplemental Agreement to the Tripartite Agreement.

An appropriate vote follows:

VOTED: That the Authority authorizes the Director to enter into a Third Supplemental Agreement to the Tripartite Agreement among the City of Boston, the Boston Redevelopment Authority, and Lafayette Place Associates in substantially the form attached hereto.

